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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

March 3, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A306
Washington, D.C. 20554

**Re: Joint Reply Comments of ABC, CBS, FOX, and NBC Television
Network Affiliate Associations, CS Docket No. 99-363**

Dear Ms. Salas:

Transmitted herewith on behalf of the ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association are an original and four (4) copies of Joint Reply Comments for filing in the above-captioned proceeding.

If any questions should arise during the course of your consideration of this matter, it is respectfully requested that you communicate with this office.

Sincerely,


Wade H. Hargrove

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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MAR 03 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY
CS Docket No. 99-363

In the Matter of)
)
Implementation of the Satellite Home)
Viewer Improvement Act of 1999)
)
Retransmission Consent Issues)

To: The Commission

JOINT REPLY COMMENTS OF THE
ABC, CBS, FOX, AND NBC
TELEVISION NETWORK AFFILIATE ASSOCIATIONS

The ABC Television Affiliates Association, the CBS Television Network Affiliates Association, the Fox Television Affiliates Association, and the NBC Television Affiliates Association (collectively, the "Network Affiliates"), by their attorneys, hereby submit these reply comments in response to the Commission's *Notice of Proposed Rule Making* ("Notice"), FCC 99-406, released December 22, 1999, in the above-captioned proceeding. The Network Affiliates represent more than 800 local television broadcast stations throughout the nation that are affiliated with one of the four major television broadcast networks.

The *Notice* requests comment in two stages on retransmission consent issues arising from implementation of the Satellite Home Viewer Improvement Act¹ ("SHVIA"). In the first stage, comment was requested on the "good faith" negotiation and "exclusive" carriage provisions. In the

¹ Pub. L. No. 106-113, § 1000(a)(9), 113 Stat. 1501 (1999) (enacting S. 1948, the Intellectual Property and Communications Omnibus Reform Act of 1999, of which Title I is the Satellite Home Viewer Improvement Act of 1999).

second stage, comment is requested on the process by which television stations elect "retransmission consent" or "must carry" status and on other administrative matters. These reply comments address the second stage of the proceeding.

I. There Should Be A Three-Year Must-Carry/Retransmission Consent Election Period For Local-Into-Local Satellite Retransmissions, And The First Election Period Should Become Effective On January 1, 2002

The *Notice* seeks comment on whether the Commission should, in establishing a satellite carrier must-carry/retransmission consent election cycle, employ the same rules and procedures the Commission adopted for cable in response to the 1992 Cable Act or adopt a different election cycle with different procedures to implement Section 325(b)(3)(C)(i).² In response to the *Notice*, both the Association of Local Television Stations, Inc. ("ALTV") and the National Cable Television Association ("NCTA") suggest a one-year initial "satellite only" election period with the initial notice of the election to be given by October 1, 2001, to become effective January 1, 2002, and, thereafter, that the three-year satellite carrier and cable election cycles coincide, beginning with the notice date of October 1, 2002, to become effective January 1, 2003.³ DirecTV, in contrast, recommends that the initial "satellite only" election period run for four years, with notice given by June 1, 2001, to become effective January 1, 2002, and that the cable and satellite election cycles be synchronized beginning in October 2005.⁴ Each of these parties recognized that, because of the satellite must carry date of January 1, 2002, there must be a distinct election period—at least

² See *Notice* at ¶ 13.

³ See Comments of ALTV at 3; Comments of NCTA at 3.

⁴ See Comments of DirecTV at 6.

initially—with regard to satellite carriers, yet each ignores the fact that that congressional directive directly affects whether the satellite carrier and cable election cycles can ever be synchronized at all.

SHVIA requires the Commission to “establish election time periods that correspond with those regulations adopted under subparagraph (B) of this paragraph,”⁵ i.e., the regulations in Section 76.64 of the Commission’s rules.⁶ The Conference Report provides no guidance on the meaning of this provision.

With regard to time, a “period” may be defined in the following relevant ways:

1. An interval of time characterized by the occurrence of a certain condition, event, or phenomenon 6. . . . a cycle. . . .

Synonyms: *period, epoch, era, age, term.* These nouns refer to a portion or length of time. *Period* is the most general⁷

Thus, a time “period” refers to an interval, a cycle, a length of time.⁸ Therefore, when Congress required the Commission to establish “election time periods that correspond” with the Commission’s regulations in Section 76.64, Congress was mandating only that the must-carry/retransmission consent election *cycle* for satellite carriers be *three years in length*, not that the starting dates and ending dates for the cable operator and satellite carrier cycles *coincide*.

Indeed, Congress’s choice of the term “correspond” instead of “coincide” is significant in

⁵ 47 U.S.C. § 325(b)(3)(C)(i).

⁶ 47 C.F.R. § 76.64

⁷ AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d. ed. 1996) at 1346-47.

⁸ See *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (“When there is no indication that Congress intended a specific *legal* meaning for the term, the court may look to sources such as dictionaries for a definition.” (emphasis added)). Cf. *Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 1914-16 (1998) (relying upon dictionaries for primary meaning of word “carry”).

light of the fact that Congress mandated that must-carry rights would accrue to broadcast stations beginning on January 1, 2002.⁹ It is well-known that satellite carriers lobbied Congress heavily to set back the advent of must carry as long as possible. Yet Congress specifically chose January 1, 2002, for must-carry rights for local-into-local satellite retransmissions, not January 1, 2003, which will be the beginning date of the fourth election period for cable, a fact with which Congress well aware.¹⁰

Taken together, it is clear that Congress's intent in Section 325(b)(3)(C)(i) was to direct the Commission to begin the first *three-year* cycle for must-carry/retransmission consent elections by broadcast stations for local-into-local retransmissions by satellite carriers on January 1, 2002.

Notwithstanding the fact that the language of SHVIA as a whole directs this interpretation, there are several important, independent reasons for the Commission to adopt staggered three-year election cycles for cable and satellite carriers. First, the Commission could be inundated with hundreds, if not thousands, of complaint proceedings if the Commission does not stagger the cable and satellite election cycles. There are more than 1200 commercial television stations, and each television station must make an election and potentially negotiate with four satellite carriers, numerous cable operators, and multiple alternative MVPDs. Even if only a small fraction of these negotiations result in a "good faith" negotiation or "exclusive contract" complaint, the Commission will not have the resources to process all such complaints at the same time. The result would be escalating frustration—for viewers, for the parties, and for the Commission—as the Commission will

⁹ See 47 U.S.C. § 338(a)(3).

¹⁰ See, e.g., *Dantran, Inc. v. United States Dep't of Labor*, 171 F.3d 58, 70 (1999) ("Congress legislates with knowledge of the legal standards prevailing in administrative law.").

be unable to resolve the complaints in a timely enough fashion.

Second, staggered election cycles would ease the administrative burden on local stations of having to negotiate all of their retransmission consent agreements at the same time. Such a burden could be onerous both for small network affiliated television stations in rural areas with few staff and for large stations in urban markets. Staggered election cycles would promote a more orderly and deliberative process for stations. If all negotiations in every market were required to occur at the same time, station personnel would be distracted from their regular duties and would necessarily be unable to devote any significant time to each negotiation. The scheduling of negotiations with multiple MVPDs would be complicated, and the difficulties attendant upon such scheduling would subject a station to complaints from MVPDs that the station refused to meet at reasonable times and places, in contravention of the "good faith" negotiation requirement. By contrast, MVPDs should be administratively indifferent to whether the election cycles are staggered or not.

Third, competition between satellite carriers and cable systems would be promoted by separate cycles, and the marketplace would function more efficiently and effectively. It is important that no one MVPD, due to market power or perceived market power, be able to hold local stations and other MVPDs hostage.

Finally, by law, the initial election cycle for satellite will be staggered from the election cycle for cable. There is no legal or logical reason that they should not remain so.

Network Affiliates, therefore, respectfully urge the Commission to adopt a must-carry/retransmission consent election cycle for satellite carriers that is staggered with the election cycle for other MVPDs. Broadcast stations should be required to give notice to satellite carriers of their first election by October 1, 2001, to take effect on January 1, 2002, with subsequent

elections made at three year intervals.

II. The "Consistent Election" Requirement Is Applicable Only To Overlapping Cable Systems

EchoStar and NCTA both argue that broadcast stations must make "consistent elections" with respect to all MVPDs in their geographic area.¹¹ However, these arguments are bereft of any statutory analysis. Section 325(b)(3)(B), added by the 1992 Cable Act, clearly states, in pertinent part:

If there is more than one cable system which serves the same geographic area, a station's election shall apply to all such *cable* systems.¹²

As Network Affiliates, NAB, and ALTV demonstrated in their comments, SHVIA does not grant the Commission authority to require "consistent elections" for any MVPD other than cable.¹³

III. A Satellite Carrier Cannot Ascribe An Election Choice To A Broadcast Station

EchoStar argues that if a broadcast station fails to make a carriage request at election time, then "the satellite carrier should be entitled to ascribe to the broadcaster whichever election would best facilitate the satellite carrier[]." ¹⁴ Under no circumstances can a satellite carrier determine what a broadcast station's election should be. Section 325(b)(1) unequivocally states that

¹¹ See Comments of EchoStar Satellite Corp. ("EchoStar") at 8-9; Comments of NCTA at 3-4.

¹² 47 U.S.C. § 325(b)(3)(B) (emphasis added).

¹³ See Joint Comments of Network Affiliates at 2-4; Comments of NAB at 1-3; Comments of ALTV at 5-7.

¹⁴ Comments of EchoStar at 7.

No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except—

(A) with the *express authority of the originating station*;

... or

(C) under section 338, in the case of a *station electing*, in accordance with this subsection, to assert the right to carriage under such section.¹⁵

The statute gives absolutely no discretion to the satellite carrier, and any such interpretation would thwart the clear intent of Congress. The enforcement provisions in Section 325(e) for illegal retransmission further demonstrate that Congress intended to deal strictly with satellite carriers that take matters into their own hands.

Network Affiliates further note that the issue of "default" elections is not before the Commission in this proceeding but will presumably arise in connection with a proceeding concerning adoption of must-carry rules.

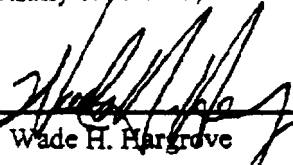
Conclusion

For the above reasons, Network Affiliates respectfully urge the Commission (1) to adopt a three-year must-carry/retransmission consent election cycle for satellite carriers that is staggered with other MVPDs; (2) to reject the suggestion that the "consistent election" requirement applies to any MVPD other than to cable systems; and (3) to reject any notion that a satellite carrier be permitted to make any election on behalf, or in lieu, of a broadcast station.


¹⁵ 47 U.S.C. § 325(b)(1) (emphases added).

Respectfully submitted,

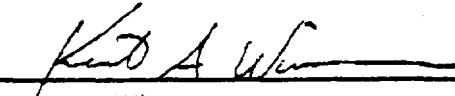
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March 3, 2000